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Introduction

Few principles of American jurisprudence are more revered and faithfully obeyed than the one requiring courts to extend the holding of a case only as far as the facts require.[1] Adherence to this tenet of judicial process is considered essential to the courts' functioning as a co-equal branch of government. Judges who violate this principle do more than invite courts in subsequent cases to dismiss the "extraneous" statements as dicta; they may undermine the legitimacy of the judicial branch by creating the perception that they are more like robed legislators than jurists.[2]

Courts have assumed some of their most important powers without specific authority from the Constitution, and have long recognized that their legitimacy rests largely on psychological grounds.[3] The ephemeral nature of judicial authority has led judges to invoke the Constitution only when necessary, and when constitutional interpretation is unavoidable, to implicate only the provisions required by the facts of the case.[4] If courts are bound by principles identified in similar cases and extend the law in the current case no more than the facts require, then constitutional interpretation will be guided by rational principle and not by judges writing their opinions into law.[5]

1. Identifying the principle, or *ratio decidendi,* of a case is no simple task. Goodhart wrote that "[w]ith the possible exception of the legal term 'malice,' [*ratio decidendi*] is the most misleading expression in English law, for the reason which the judge gives for his decision is never the binding part of the precedent." Goodhart, *Determining the Ratio Decidendi of a Case,* 40 YALE L.J. 161, 162 (1930).

2. *See generally* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L.J. 920 (1973).

3. Although there is some evidence that the framers intended the Supreme Court to have the power of judicial review of congressional legislation, the Constitution does not specifically grant the Supreme Court such authority. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); W. REHNQUIST, THE SUPREME COURT 306 (1987) (the framers of the Constitution "wanted the judges to be independent of the president and of Congress, but in all probability they also wanted the federal courts to be able to pass on whether or not legislation enacted by Congress was consistent with the limitations of the United States Constitution."); C. PRITCHETT, CONSTITUTIONAL LAW OF THE FEDERAL SYSTEM 152-56 (1984). Judge Robert Bork wrote that *Marbury* was not the first time the Court asserted the power to invalidate legislation. Eleven years before *Marbury,* in Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), most of the justices refused to comply with a statute because it assigned them duties not of the judicial nature specified in the Constitution. R. BORK, THE TEMPTING OF AMERICA 24 (1990).

4. In a concurring opinion in Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936), Justice Brandeis reviewed the standards the Court had developed to avoid passing on constitutional questions, stating that the Court "will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Id.* at 347 (Brandeis, J., concurring) (quoting Liverpool, N.Y. & Phil. S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885).

5. Sir William Blackstone (1723-1780), an English jurist whose *Commentaries on the Laws of England* became one of the most influential writings in Anglo-American legal theory,

The process by which courts came to assume their role as final arbiters of the Constitution demonstrated an understanding of the importance of voluntary compliance with their decisions.[6] Judicial decisions are not self-enforcing, and there must be widespread acceptance that a court has the right to decide an issue even when there is disagreement over the way a particular case is resolved.[7] Implementation of judicial directives, even from the Supreme Court, requires the cooperation of other branches of government and affected parties. With some important exceptions, the Court has generally understood just how far public tolerance of controversial decisions will permit it to go.[8] The justices have

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wrote that the true function of judges was to "declare" the law. Judges were "the depositaries of the law; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decided according to the law of the land." W. MURPHY & C. PRITCHETT, COURTS, JUDGES & POLITICS 12 (1961). Thus, according to Blackstone, judges did not decide cases based on their own values. *Id.* at 14.

6. Sometimes compliance has been difficult to secure. *See* Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983) (an Alabama federal judge, in an opinion described by the solicitor general as one "in which the district judge thumbed his nose at the Supreme Court," determined that the Supreme Court had "erred in its reading of history" when it held that prayers in public schools violated the Constitution's prohibition against establishment of religion); *Ex parte* NAACP *in re* State *ex rel.* Patterson v. NAACP, 265 Ala. 349, 91 So. 2d 214 (1956), *rev'd and remanded sub nom.* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958), *on remand sub nom. Ex parte* NAACP *in re* State *ex rel.* Patterson, 268 Ala. 531, 109 So. 2d 138 (1959), *rev'd and remanded sub nom.* NAACP v. Alabama *ex rel.* Patterson, 360 U.S. 240 (1959), *on remand sub nom*, NAACP v. State, 274 Ala. 544, 150 So. 2d 677 (1962), *rev'd and remanded sub nom.* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964) (the same case went to the Supreme Court three times after Alabama refused to comply with the Court's order to allow the NAACP to do business in the state); Williams v. Georgia, 349 U.S. 375 (1955) (Georgia executed a black man convicted of murder even though the Supreme Court had overturned the conviction of another defendant in which the identical method of excluding black jurors was used). *See also* Williams v. State, 211 Ga. 763, 88 S.E.2d 376 (1955), *cert. denied,* 350 U.S. 950 (1956); Brown v. Board of Educ., 347 U.S. 483 (1954) (a celebrated case that generated much additional litigation to force compliance).

7. There have been efforts to curtail the appellate jurisdiction of the Supreme Court, to change the number of justices in an effort to influence its decisions, and to require a two-thirds majority of the Court before a statute can be invalidated, none of which became law. *See* S. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 343 (1989). In 1868, Congress passed, over President Johnson's veto, a law removing from the jurisdiction of the Supreme Court appeals from federal circuit courts in habeas corpus cases, which the Court upheld in *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

8. Among the more famous examples of self-inflicted crises of legitimacy were Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) and Lochner v. New York, 198 U.S. 45 (1905). The Court invalidated thirteen laws of Congress between 1934 and 1936, mostly involving New Deal recovery statutes, thus precipitating FDR's "court-packing" plan. *See, e.g.,* Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). *See also* Roosevelt's speech of Mar. 9, 1937, S. REP. No. 711, 75th Cong., 1st Sess., 41-44. *See generally* L. TRIBE, GOD SAVE THIS HONORABLE COURT 33, 66-67 (1985); A. COX, THE COURT AND THE CONSTITUTION 147-50 (1987); W. REHNQUIST, *supra* note 3, at 71.

usually avoided exercising authority in a way that alarms large segments of the population.[9]

Although not well understood by the public, the principle of *stare decisis* provides stability to the common law that allows the judiciary to make controversial decisions without being considered dangerous to the other branches of government and the rights granted in the Constitution. The authority of already decided cases is thought to limit the discretion of individual judges. Even changes in court membership that result in swings in judicial philosophy rarely undermine the legitimacy of the judiciary, even while serving as a stark reminder that courts are political institutions.[10]

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9. Rehnquist observed,

> We want our federal courts, and particularly the Supreme Court, to be independent of popular opinion when deciding the particular cases or controversies that come before them. The provision for tenure during good behavior and the prohibition against diminution of compensation have proved more than adequate to secure that sort of independence. The result is that judges are responsible to no electorate or constituency.

W. REHNQUIST, *supra* note 3, at 236. Rehnquist added that because an elected president appoints and an elected Senate confirms nominees to the federal courts, "public opinion has some say in who shall become judges of the Supreme Court." *Id.* Rehnquist acknowledged that the Supreme Court is influenced by public opinion:

> I was recently asked at a meeting . . . whether the justices were able to isolate themselves from the tides of public opinion. My answer was that we are not able to do so, and it would probably be unwise to try. We read newspapers and magazines, we watch news on television, we talk to our friends about current events. No judge worthy of his salt would ever cast his vote in a particular case simply because he thought the majority of the public wanted him to vote that way, but that is quite a different thing from saying that no judge is ever influenced by the great tides of public opinion that run in a country such as ours.

Id. at 98.

10. Judges who adhere to already decided principles may be viewed by some as exercising "restraint," while those who more creatively depart from precedent may be described as "activist." Those terms may, however, be as unhelpful in describing judicial philosophy as the terms "liberal" or "conservative." For example, from about 1887 to 1937, an "activist" yet indisputably conservative Supreme Court used the due process clause of the fourteenth amendment to strike down economic legislation.

The principle of "substantive due process" was first confined to the dissents and minority opinions of the Supreme Court Justices. *See, e.g.*, Munn v. Illinois, 94 U.S. 113 (1887) (Field & Strong, JJ., dissenting) (refusing to interfere with a regulatory statute, but accepting the obligation to appraise the legislation on substantive due process grounds); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) (Bradley, J., dissenting) (refusing to invalidate on due process grounds a monopoly granted by state statute); *see also* Mugler v. Kansas, 123 U.S. 623 (1887) (separate opinion of Field, J.); *In re* The Railroad Comm'n Cases, 116 U.S. 307 (1886) (Harlan & Field, JJ., dissenting); Davidson v. New Orleans, 96 U.S. 97 (1878) (Bradley, J., concurring). Majority opinions articulated the principle beginning in the Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886), and Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890), cases. The justices who invalidated economic and health regulations were every bit as activist as those of the Warren Court of the 1960s who extended procedural rights under the fourth through eight amendments. *See, e.g.*, Miranda v. Arizona,

Although the perception that even judges who enjoy lifetime tenure cannot wreak havoc on the Constitution may assuage concerns about an imperial judiciary, it cannot be seriously argued that judges are or have ever been confined to the role of merely discovering and announcing the law.[11] That judges add a creative element to the law, and can almost always distinguish or even ignore a precedent, is no longer open to debate.[12] Indeed, while *stare decisis* may limit individual judicial discretion, the flexibility of the common law, which is one of its great strengths, makes it susceptible to manipulation.

Gradual development of the law may be necessary to protect the courts' fragile legitimacy. It can lead, however, to a frustratingly slow evolution of constitutional principles. Important questions may remain unanswered for decades. In the absence of guidance from the Supreme Court, key federal constitutional provisions are subjected to widely varying interpretation by state and lower federal courts. The framers of the Constitution created a federal system where state sovereignty would be respected;[13] they may not, however, have approved of fundamental pro-

384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

11. The sociological jurisprudence school of legal scholars challenged Blackstone's theories by demonstrating the importance of social science to law, and by suggesting that to a significant degree, the law is what judges say it is. Oliver Wendell Holmes, who served on the Supreme Court from 1902-1935, had the best platform from which to expound on the principles of the sociological jurisprudence movement. *See* O. HOLMES, THE COMMON LAW (1881); Holmes, *The Path of the Law,* 10 HARV. L. REV. 457 (1897). Other influential members of the movement included Roscoe Pound (1870-1964), who was to become dean of the Harvard Law School, and Benjamin Cardozo (1870-1938), who served on the Supreme Court from 1932-1938. *See* R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

In the 1920s, a group later called "legal realists" broke from the sociological school. In challenging the "declaratory" theory of Blackstone, and the modest criticism of the sociological jurisprudence movement, the "realists" argued that legal study should concentrate on judicial decisions and their effects, suggesting a stronger role for other social sciences. *See generally* K. LLEWELLYN, THE BRAMBLE BUSH (1951). Perhaps, the most influential legal realist was Jerome Frank, who later became a federal court of appeals judge. Frank applied Freudian psychology and theories of child development to empirical data on judicial behavior in his seminal work, J. FRANK, LAW AND THE MODERN MIND (1930).

12. The common law has long been recognized not as static, but as a "dynamic and growing thing and its rules arise from the application of reason to the changing conditions of society." McCormack v. Oklahoma Publishing Co., 613 P.2d 737, 740 (Okla. 1980). The Supreme Court noted in Hurtado v. California, 110 U.S. 516, 530 (1884), that "[t]his flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."

13. *See generally* A. COX, *supra* note 8, at 62-67; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that the Supreme Court has the power to review Acts of Congress); Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that the fifth amendment to the U.S. Constitution and, by application, the procedural rights guaranteed under the fourth through eighth amendments, were a check against federal power and were not applicable to the states).

visions of the Constitution meaning one thing in one state and something very different in another.[14] Certain provisions of the Constitution are of such fundamental importance that they should not be subject to local custom or interpretation, but must be implemented through national standards.[15]

Jurisdictional differences may be the most troublesome when first amendment rights are at stake. Freedom of speech and press are so essential to a democratic society they have been placed in a "preferred position."[16] Although other rights in the Constitution are clearly important, it has long been held that a self-governing society must protect zealously its right of freedom of communication to function prop-

14. In PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), the Supreme Court unanimously held that the California constitution could provide for individual liberties more expansive than those conferred by the federal constitution, so long as there was no taking without just compensation or violation of any other federal constitutional provision. 447 U.S. at 83 (Rehnquist, J., writing for the majority).

15. The difficulty of determining what is to be a federal constitutional standard, and what will be subject to local prerogative, has challenged American courts throughout their history. *See* Labunski, *Pennsylvania and Supreme Court Libel Decisions: The "Libel Capital of the Nation" Tries to Comply,* 25 DUQ. L. REV. 87 (1986) (discussing implementation of increased state autonomy to determine libel standards involving private person plaintiffs). In nonfederal question cases, the "diversity of citizenship" clause of the Constitution allows residents of one state to sue residents of another in federal court; however, easy access to federal courts led to abuses in several cases. *See* Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928) (overruled by Erie R.R. v. Tompkins, 304 U.S. 64 (1938)); Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (overruled by Erie R.R. v. Tompkins, 304 U.S. 64 (1938)).

Section 34 of the Judiciary Act of 1789 provided that in diversity cases at common law, the laws of the several states should be the rules of decision of the federal courts. Judiciary Act, ch. 20, 1 Stat. 73 (1789). Justice Story, writing for the Supreme Court in *Swift*, decided that "the laws of the several states" referred only to state statutes, and did not cover the unwritten or common law of the states. *Swift*, 41 U.S. at 18-19. Thus, in the absence of state statutes controlling a case, federal courts were free to adopt and apply such general principles of law as they thought applicable.

The Court eventually held in *Erie* that federal courts should apply state law in diversity actions whether the law of the state is declared by its legislature or by its highest court. Later, the Court became dissatisfied with *Erie* and held that where "countervailing factors" of federal interest are of overriding importance, federal policy rather than state law can be applied. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); *see also* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case,* 71 HARV. L. REV. 1 (1957).

16. For development of the "preferred position" theory, see Thomas v. Collins, 323 U.S. 516, 529-30 (1945) (finding that presumption supporting legislation must be weighed against preference given to freedoms of first amendment); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (holding that it is immaterial that ordinance is nondiscriminatory because first amendment rights stand in preferred position and cannot be easily restricted). The genesis of the preferred position theory is thought to be Justice Stone's footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). *See also* Palko v. Connecticut, 302 U.S. 319, 326-27 (1937) (stating that neither liberty nor justice would exist without freedom of thought and speech).

erly.[17] Any statute, court order, or administrative policy that restricts freedom of speech or press is subject to strict judicial scrutiny and must clear numerous constitutional hurdles.[18]

Having recognized for nearly half a century the near-sacred position that freedom of speech and press occupy in our society, the Supreme Court would be expected to demonstrate an acute concern for the effects of its first amendment decisions, including the consequences of failing to settle important issues. Although it has often protected first amendment rights from infringement by the legislative and executive branches of government, the Court has been less sensitive to the problems *its own rulings* have caused.

This Article urges the adoption of procedures by which courts deciding first amendment cases would be able to extend the holding beyond the facts. These changes would allow courts to formulate rules of law that are based on, but not limited to, the circumstances of the present case, and would not require courts to wait indefinitely for a future case to settle other important issues. This proposal does not cut judges loose to create law in an ad hoc, chaotic manner that will undermine the legitimacy of the courts; relevant precedents will still be carefully measured and the new rules will emanate from them.[19] The new procedures would, however, prevent compelling first amendment questions from languishing indefinitely, and thus would be in keeping with the special treatment the first amendment has long received.

Granting courts this additional authority may be unsettling to some, especially those convinced that judges already legislate or otherwise abuse their authority whenever whim moves them. It will be argued, however, that this proposal is no more controversial, and is in fact a more forthright acknowledgement of judicial power, than the manipulation to which the law is already subjected. By requiring courts to identify clearly the portions of their opinions that are not grounded in the facts of the case, this proposal may have the effect of permitting greater first amendment protection, while not increasing more general judicial authority.

17. *See generally* Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245-55; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

18. The Supreme Court has declared, for example, that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). *See also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (balancing freedom of expression against sixth amendment right to a fair trial).

19. For a critical examination of the "ad hoc balancing" theory of the first amendment, see Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912-14 (1963). *See also* Konigsberg v. State Bar, 366 U.S. 36, 50-51 (1961).

I
Unsettled First Amendment Issues

The Supreme Court renders judgment in, at most, a few first amendment cases a year.[20] Even when it has the opportunity, the Court may decline to clarify an important first amendment issue, leaving it unsettled for years, or even indefinitely. Admittedly, the Supreme Court may gain valuable information from observing how lower courts handle unresolved questions. However, the wisdom gained from such delays often comes at a high price. The interim period, in which lower courts seek to anticipate what the Supreme Court would do under similar circumstances, often leads to confusion and inconsistency within and among jurisdictions, and to a corresponding diminution of first amendment rights.[21]

The delay in resolving essential first amendment questions may cause an erosion of respect for Supreme Court opinions. Faced with serious gaps in first amendment jurisprudence, lower courts must fill in the answers that the Supreme Court failed to provide.[22] Once accustomed to exercising such discretion, it may be tempting for lower courts to "rewrite" future Supreme Court opinions with which they disagree.

This Article examines one area of first amendment law where case-by-case adjudication and limiting the holding to the facts have all but rendered useless an important invasion of privacy tort. Although it had the opportunity, the Court failed to clarify what standard of liability applies to false-light invasion of privacy actions brought by private person plaintiffs against news organizations, and thus pushed such plaintiffs toward bringing defamation actions. This cutting off of false-light privacy cases for private persons serves neither their interests, nor those of the news organizations that must then defend the more potentially inhibiting defamation suits.[23]

20. In its 1989-1990 term, the Supreme Court continued the trend of reviewing fewer cases. *See* Greenhouse, *Case of the Shrinking Docket: Justices Spurn New Appeals,* N.Y. Times, Nov. 28, 1989, at A1, col. 1.

21. *See, e.g.,* Hepps v. Philadelphia Newspapers, Inc., 506 Pa. 304, 485 A.2d 374 (1984) (the Pennsylvania Supreme Court rejected the opinions of federal courts in its jurisdiction, its own state courts, and the implied holding of the U.S. Supreme Court in *Gertz v. Robert Welch, Inc.*, by finding that in cases involving private person libel plaintiffs, the burden of proof is on the defendant), *rev'd,* 475 U.S. 767 (1986).

22. A good example is Branzburg v. Hayes, 408 U.S. 665 (1972), which rejected a claim that the first amendment grants absolute privilege to journalists to refuse to divulge the names of sources to a grand jury. Because the Court's decision was based on an unrepresentative set of circumstances, and because of the thoughtful dissent by Justice Stewart, lower courts have largely ignored the majority opinion and acted as if Justice Stewart had spoken for the Court.

23. For a discussion of how costly libel suits can be to both plaintiff and defendant, and why such suits rarely lead to a satisfying conclusion, see generally R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS (1987) [hereinafter R. BEZANSON]. *See also* D. PEMBER, MASS MEDIA LAW 102-04 (1990).

The area of false-light privacy was chosen for two reasons: First, it would be difficult to find a clearer example of how the Court ignored its own precedents and derailed the momentum leading to a definitive ruling on the question of standard of liability only because the facts in the case did not precisely fit the Court's expectations; and second, it was chosen because false-light privacy, and its closely related cousin, defamation, are matters of substantial first amendment interest. Moreover, the Court's inaction in this area has spawned numerous contradictory rulings not only from state to state, but also within the same jurisdiction.

A. Dictum in One Case Becomes *Ratio Decidendi* in Another

Contiguous decision-making would, in effect, grant judges limited authority to write dicta that will have the precedential value of *ratio decidendi*.[24] Such a scheme may seem at first to be a shocking enlargement of judicial authority. It will be argued, however, that courts frequently transform dicta from previous cases to *ratio decidendi* in the suit presently before them. Forthright admission by judges that this is relatively common would be new, and, to many, refreshingly honest.

First amendment law is replete with examples of extraneous, even innocuous statements, that later became the foundation on which significant speech and press rights were built. The potential importance of dicta is nowhere better illustrated than in Justice Sanford's statement in *Gitlow v. New York*[25] that the first amendment was applicable to the states through the due process clause of the fourteenth amendment.[26]

24. More than half a century ago, Goodhart suggested five rules for determining how the *ratio decidendi* of a case can be found. *See* Goodhart, *supra* note 1, at 182. His first two rules explain how the principle of the case is *not* to be found: 1) The principle of a case is not found in the reasons given in the opinion; and 2) the principle is not found in the rule of law set forth in the opinion. *Id.* These first two rules suggest that it is not enough to know what the judge said. One must know the relationship between the facts of the case and the decision. The principle of a case cannot be established without knowing the facts of that case. But Goodhart's third rule indicates that there is even more to the issue: 3) The principle is not necessarily found by a consideration of all the ascertainable facts of the case and the judge's decision. *Id.* Not all facts of a case were relevant to establishing the principle of the decision. One must have a standard to determine which facts were relevant: 4) The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them. *Id.* These four statements provide rules by which to search for the *ratio decidendi.* Goodhart offers one final guide to relevance: 5) In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, for the principle may depend as much on exclusion as it does on inclusion. *Id.* Goodhart then provided 10 rules for finding what facts are material and what facts are immaterial. *Id.* at 182-83.

25. 268 U.S. 652 (1925).

26. *Id.* at 666. Sanford wrote as follows: "[W]e may and do assume that freedom of speech and of the press—which are protected by the [f]irst [a]mendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the [f]ourteenth [a]mendment from impairment by the States." *Id.*

The statement was unnecessary to the Court's decision upholding Gitlow's conviction. Nevertheless, it greatly enlarged the scope of first amendment protection by making it a check against state as well as federal power.[27]

Dicta are sometimes so closely intertwined with essential elements of an opinion that it is nearly impossible to tell where one ends and the other begins. Judicial opinions that do not provide at least some elaboration or examples would be of limited value to lower courts trying to implement appellate court standards. But some judges have seized seemingly unimportant words in prior cases to launch a new constitutional principle when the right case presented itself.[28]

The transformation from dicta to *ratio decidendi* may take many years. Among the most famous dicta ever written in a first amendment case were Chief Justice Hughes' statements in *Near v. Minnesota*[29] that prior restraint would be permissible under certain circumstances.[30] Although the Supreme Court later recognized that Hughes was merely providing examples,[31] a federal district court subsequently treated them with a respect normally reserved for *ratio decidendi* in issuing an injunction restraining a magazine from publishing an article about a hydrogen bomb.[32] Judge Warren, who recognized in *United States v. Progressive* that his injunction against the magazine was unprecedented, accepted the dicta in *Near* as the standard by which to measure the constitutionality of the injunction.[33]

27. Six years later in Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931), Chief Justice Hughes wrote the following statement: "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the [f]ourteenth [a]mendment from invasion by state action." *Id.* at 707.

28. Justice Stone, for example, was apparently able to frequently hide narrow statements that he later transformed into broad principles. A former law clerk wrote that he was "like a squirrel storing nuts to be pulled out at some later time. And there was mischief as well as godliness in his delight when his ruse was undetected and the chestnuts safely stored away." W. MURPHY & C. PRITCHETT, *supra* note 5, at 394-95.

29. 283 U.S. 697 (1931).

30. Hughes wrote, "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Id.* at 716. Despite the dictum, the Court held the injunction prohibiting further publication of *The Saturday Press* was an unconstitutional prior restraint in that case.

31. In New York Times Co. v. United States, 403 U.S. 713 (1971), Chief Justice Burger wrote in dissent that the rights under the first amendment are not absolute: "There are other exceptions [such as Holmes' aphorism concerning the right to shout "fire" in a theatre], some of which Chief Justice Hughes mentioned *by way of example* in Near v. Minnesota." 403 U.S. at 749 (Burger, J., dissenting) (emphasis added). *See also id.* at 726 (Brennan, J., concurring).

32. United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), *dismissed,* 610 F.2d 819 (7th Cir. 1979).

33. *Id.* at 996.

A more remarkable transformation of first amendment law emerging from dictum stems from a footnote tucked away in the Supreme Court case of *United States v. Carolene Products Co.*[34]

Carolene Products involved Congress' authority to regulate interstate transportation of certain milk products. In a matter of economic regulation having nothing to do with the first amendment, Justice Stone, writing for the Court, suggested that although courts should grant legislatures substantial discretion to regulate the economy, they may need to scrutinize more closely laws that interfere with the workings of representative government, including, presumably, communication. Stone argued that laws interfering with first amendment rights should be examined more carefully because they are less susceptible to correction through democratic processes. Within a decade, this statement grew to become the dominant theory of the supremacy of the first amendment, forever changing the way freedom of speech and press is balanced with other societal interests.[35]

Justice Stone's footnote became the "preferred position balancing theory" of the first amendment under which any restriction on expression carries a presumption of unconstitutionality.[36] Considered together, the dicta in *Gitlow* applying the first amendment to the states through the fourteenth amendment, the statement in *Near* that became a standard for judging exceptions to the prior restraint rule, and the *Carolene Products* footnote that led to nearly invincible protection of the first amendment, show that statements not directly tied to the facts of the case already play a significant role in constitutional interpretation.

B. Creating the Principle of "Contiguous Decision-Making"

Given the imprecision of language and the redundancy necessary to properly instruct those who carry out court directives, judicial opinions will invariably contain statements not essential to deciding the case.[37] As previously shown, such statements occasionally form the basis for a new constitutional principle. In the usual case, however, because of the importance of maintaining the perception that judges are interpreting the

34. 304 U.S. 144, 153 n.4 (1938). Stone, in writing the opinion, restated the "reasonable man" theory presuming the validity of regulatory legislation unless there was no rational basis on which legislators acted. He then stated in the famous footnote that judicial deference to legislative acts may not be appropriate when first amendment rights are involved, but may instead require "more searching judicial inquiry." *Id.*

35. Bork characterizes this enlargement of the first amendment as "pernicious." R. BORK, *supra* note 3, at 58-61.

36. *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

37. *See* Shapiro, *Toward a Theory of Stare Decisis,* 1972 J. LEGAL STUD. 125, 134.

law and not creating it, the statements labeled "dicta" are often ignored or derided.[38]

Contiguous decision-making would authorize courts, within relatively narrow limits, to extend the holding beyond the facts when three conditions are present: First, when significant first amendment issues would otherwise remain unsettled; second, when those issues have been peripherally addressed in relevant precedents; and third, when the extended principle is "contiguous" with the central elements of the current case. The additional statements, although not directly emanating from the present facts, will have the same precedential value of those that did and may not be dismissed as dicta in subsequent cases.

The principle of contiguous decision-making will not lead to immutable rules which can be applied evenly in every case. Nevertheless, it will provide courts with the opportunity to settle, within rational limits, important first amendment questions which would otherwise languish indefinitely.

Implementing contiguous decision-making will not be easy. Only those cases which meet certain criteria will be appropriate vehicles for courts to go beyond the facts of the case and settle anticipated issues. Contiguous decision-making must include incentives for courts and attorneys to identify problems that may arise in future cases.[39] It will also require courts to divide their opinions into sections directly traceable to the facts and sections that deal with anticipated questions not directly derived from the facts of the case.

The proposed changes should not be characterized as "advisory opinions." The Supreme Court wisely declined to offer advisory opinions in its earliest days, and this decision has withstood the test of time. Rather, these changes offer courts the limited authority in first amendment cases to anticipate issues closely related to the facts in order to guide lower courts in dealing with important first amendment questions. The alternative to such authority is interminable delay while appellate courts wait for the case with just the right facts to emerge.

38. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (criticizing Myers v. United States, 272 U.S. 52 (1926). In these cases, the Court disapproved dicta from prior cases which conflicted with the holding of the case at bar.

39. Litigants will undoubtedly resist paying attorneys for time spent briefing courts on anticipated issues that do not directly affect their case. However, courts could insist that the additional work on "contiguous" issues, which should not add greatly to the time required to file the brief on issues emanating from the present facts, could be part of the attorney's pro bono activity and thus should be rewarded as such by both the law firm and the courts.

II

Case-by-Case Adjudication: Problems for the First Amendment

Some first amendment principles have evolved with the speed of a glacier. That the first amendment itself lay largely dormant from 1791, when it was ratified by the states, to 1919, when the Supreme Court applied it to sedition cases arising during World War I, reflects the first amendment's gradual development.[40] Not until 1925 did the Court determine, in an almost offhand remark, that the rights guaranteed under the first amendment were applicable to the states through the due process clause of the fourteenth amendment.[41] The Court did not consider a case

40. *See* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919). The Court was presented with a number of opportunities prior to 1919 to confront first amendment claims, which it always rejected. *See* Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915) (upholding motion picture censorship because film exhibition was simply a profit-making business and not "part of the press of the country."); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) (upholding an injunction against labor picketing, on grounds that the speech as a means for accomplishing an unlawful purpose was conduct, not speech); Davis v. Massachusetts, 167 U.S. 43 (1897) (upholding on other than first amendment grounds a Boston ordinance requiring a permit from the mayor for any public address in a public park). *See generally* Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981); Blanchard, *Filling the Void: Speech and Press in State Courts prior to Gitlow*, in THE FIRST AMENDMENT RECONSIDERED 14 (Chamberlin and Brown eds. 1982) (arguing that state experience with first amendment rights influenced federal courts). Blanchard demonstrates that state courts developed experience in first amendment litigation that informed the Supreme Court when it finally concerned itself with formulating rules under the amendment.

41. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925). It would be another 36 years before the Court began applying the fourth through eighth amendments to the states. *See* Furman v. Georgia, 408 U.S. 238 (1972) (applying "cruel and unusual punishment" provision of the eighth amendment to state death penalty cases); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to trial by jury extended to state prosecutions); *In re* Gault, 387 U.S. 1 (1967) (requiring states to permit appeal of a juvenile court decision); Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1964) (both applying procedural rights of criminal suspects to the states); Malloy v. Hogan, 378 U.S. 1 (1964) (applying "self-incrimination" provision of fifth amendment to the states); Gideon v. Wainwright, 372 U.S. 335 (1963) (extending sixth amendment right to counsel to the states); Mapp v. Ohio, 367 U.S. 643 (1961) (applying the "exclusionary rule," first required in federal prosecutions in Weeks v. United States, 232 U.S. 383 (1914), to the states); *see also* Gregg v. Georgia, 428 U.S. 153 (1976) (holding that the death penalty is not inherently cruel and unusual).

Gitlow was all the more surprising because only three years earlier in Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922), the Court flatly held that "the Constitution of the United States imposes upon the States no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence." *Id.* at 538. Justice Holmes wrote pre-*Gitlow* opinions holding that speech could be penalized if it had a "bad tendency" on public welfare. *See* Fox v. Washington, 236 U.S. 273 (1915) (upholding punishment for an article protesting enforcement of a ban on nude bathing as having encouraged a breach of the law); Paterson v. Colorado, 205 U.S. 454 (1907) (upholding a contempt conviction for criticizing judicial behavior as subsequent punishment for obstructing the administration of justice); *see also* Pierce v.

involving prior restraint until 1931,[42] and not again until 1971.[43] It took 173 years for the Supreme Court to consider the implications of state libel laws on the first amendment.[44] In 1967, the Court finally decided its first privacy case involving the mass media.[45] Eight more years passed before the Court seriously considered the extent to which commercial speech is entitled to first amendment protection.[46]

The Supreme Court's practice of hearing relatively few first amendment cases and of limiting the holding of each case to the facts means that it can directly address only a fraction of the key issues related to freedom of speech and press. Even more frustrating are those occasions when the Court finally has the opportunity to extend its holding to the point where the case has some practical value for lower courts, but declines to do so, preferring to postpone a decision on the matter until a future case arises.

A. False-Light Privacy: The Missed Opportunity

No first amendment case more clearly demonstrates the problems caused by the Court's obedience to the principle of formulating rules limited to the facts than *Cantrell v. Forest City Publishing Co.*[47] The Court's failure to decide the question of the standard of liability for private person plaintiffs in false-light privacy[48] cases has spawned contradictory

Society of Sisters, 268 U.S. 510 (1925) (invalidating Oregon constitutional amendment denying parents the right to send their children to private schools on the grounds that it interfered with the property rights of religious schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down Nebraska law prohibiting the teaching of German even in private schools on the grounds that the livelihood of those who teach German was protected by "liberty" clause of the fourteenth amendment). *Gitlow* followed *Pierce* by only one week.

42. Near v. Minnesota, 283 U.S. 697 (1931).

43. Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); New York Times Co. v. United States, 403 U.S. 713 (1971).

44. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See generally* R. LABUNSKI, LIBEL AND THE FIRST AMENDMENT: LEGAL HISTORY AND PRACTICE IN PRINT AND BROADCASTING (1989).

45. Time, Inc. v. Hill, 385 U.S. 374 (1967). At least two states have not recognized the tort of invasion of privacy at common law, concluding that the issue is more properly one for legislative determination. *See* Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955); Kalian v. People Acting Through Community Effort, Inc., 122 R.I. 429, 432, 408 A.2d 608, 609 (1979).

46. *See* Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975); Valentine v. Chrestensen, 316 U.S. 52 (1942).

47. 419 U.S. 245 (1974).

48. An invasion of privacy by publicity that places the plaintiff in a false light in the public eye was first identified as a distinct tort by Prosser in a well-known law review article. *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). Prosser examined over 300 cases decided in the 70 years since Warren and Brandeis originated the concept of a legal right of

opinions in lower courts, and has virtually prevented such plaintiffs from using false-light privacy to win compensation from news organizations.[49] Cutting off those injured by irresponsible media coverage from privacy claims, thus forcing them to sue under libel standards, increases the likelihood that neither plaintiff nor defendant will be treated fairly by the process.[50] If the Court had added a single sentence to its opinion in *Cantrell,* one that addressed an issue that was clearly "contiguous" with already settled matters, many of the problems created by the case could have been avoided.

In December, 1967, Margaret Cantrell's husband was killed in a West Virginia bridge collapse. Five months later, the same reporter who had reported on the tragedy returned to the Cantrell home to see how Mrs. Cantrell and her four children were managing.[51] The ensuing article stressed the family's dire situation, saying that they were living in poverty, that the children were wearing old, ill-fitting clothes, and that the house was deteriorating.

The article gave the unmistakable impression that Mrs. Cantrell had been interviewed,[52] although she was not at home at any time when the reporters were there. In addition, the story misrepresented the condition

privacy in their famous article. *See* Warren & Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890). He concluded that the decisions established four independent privacy torts: false light, intrusion upon one's solitude or seclusion, public disclosure of private facts, and appropriation. When Prosser attempted to define false-light privacy, he wrote that no clear definition was available, but that it was "publicity that places the plaintiff in a false light in the public eye." Prosser, *supra,* at 398. Prosser noted that the material need not be defamatory in false-light privacy (a requirement in libel), but might well be. *Id.* at 400. The most typical instances of false light are coincidental uses of names, fictionalization, distortion, embellishment, and misuse of names and pictures through unfortunate juxtapositions in otherwise legitimate news stories. D. GILLMOR, J. BARRON, T. SIMON & H. TERRY, MASS COMMUNICATION LAW 314 (5th ed. 1990).

49. The status of a plaintiff, *i.e.,* whether a public official or public figure, or private person, is a key element in defamation and privacy cases. In most states, a private libel plaintiff need prove only negligence to win a lawsuit, while a public official or public figure must prove actual malice (knowing or reckless disregard of the truth), a much more difficult standard. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). For definitions of a private person and cases allowing recovery for defamatory falsehood on a showing less strict than actual malice, see Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Readers' Digest Ass'n, 443 U.S. 157 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch Inc., 418 U.S. 323 (1974).

50. *See generally* R. LABUNSKI, *supra* note 44. Libel suits require the investment of substantial economic resources. Pre-trial issues such as the status of the plaintiff (public official, public figure, or private person), the standard of liability (malice, negligence, or gross negligence), and the long discovery process all have the potential to make a libel suit more costly and complicated than a privacy suit.

51. 419 U.S. at 247.

52. The article included, in part, the following statements:

> Margaret Cantrell will talk neither about what happened nor about how they are doing. She wears the same mask of non-expression she wore at the funeral. She is a

of her home by saying the family was living in dirty and dilapidated conditions.[53] A jury found for Mrs. Cantrell and one of her children, holding that the newspaper had presented them in a false light, thereby making them objects of pity and ridicule, and causing them to suffer outrage, mental distress, shame, and humiliation.[54]

The Supreme Court, with only Justice Douglas dissenting, upheld this decision. The Court used the "actual malice" standard first formulated in *New York Times Co. v. Sullivan,*[55] and applied three years later in the Court's first privacy case involving a news organization, *Time, Inc. v. Hill.*[56] In *Hill,* the Supreme Court held that the constitutional protections for speech and press barred recovery for false reports of matters of public interest in the absence of proof that the defendant published the report with actual malice.[57]

The trial court judge in *Cantrell* followed *Hill* and instructed the jury that liability could be imposed only if the newspaper had published the article with actual malice, namely knowledge of falsity or reckless disregard of the truth. Significantly, no objection to this instruction was made by any of the parties.[58] The actual malice standard was erected to

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> proud woman. Her world has changed. She says that after it happened, the people in town offered to help them out with money and they refused to take it.

Id. at 248 (quoting Eszterhas, *Legacy of the Silver Bridge,* Plain Dealer, Aug. 4, 1968 (Sun. Magazine), at 32, col. 1).

53. *Id.*

54. *Id.*

55. 376 U.S. 254, 279-80 (1964). The *New York Times* Court wrote as follows:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80. *See* Kalven, *The New York Times Case: A Note on "The Central Meaning of The First Amendment,"* 1964 SUP. CT. REV. 191.

56. 385 U.S. 374 (1967). The Court reversed a compensatory damage award based on the plaintiff's complaint that a magazine had falsely reported that a new Broadway play portrayed the plaintiff's family's experience in being held hostage by three escaped convicts.

57. *Id.* at 388. The *Hill* Court did not actually use the term "actual malice," but repeated its definition of "knowing or reckless falsehood," according to Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251 n.4 (1974).

58. *Cantrell,* 419 U.S. at 250 n.3. There was some confusion in *Cantrell* as to whether the trial judge's instructions to the jury were based on *New York Times* actual malice, or the common-law actual malice that is frequently expressed in terms of either personal ill-will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights. The difference is significant because common law malice focuses on the defendant's attitude toward the plaintiff, while actual malice is primarily concerned with whether the defendant entertained serious doubts as to the truthfulness of the statement, or should have had such doubts.

In *Cantrell,* the trial judge struck Mrs. Cantrell's demand for punitive damages, finding that she had failed to present any evidence to support the charges that the invasion of privacy "was done maliciously within the legal definition of that term." *Id.* at 251. The Court of

give news organizations substantial "breathing space" in which to make errors when covering newsworthy events and individuals.[59] In practice, it has proved to be a formidable obstacle to those suing news organizations. Even when reporters are guilty of serious transgressions that deviate substantially from accepted journalistic practice, courts have held that the plaintiff failed to prove that the defendant acted with knowing or reckless disregard.[60] The standard of liability issue is significant because plaintiffs, whether bringing defamation or privacy suits, find it nearly impossible to win cases where proof of actual malice,[61] as opposed to negligence,[62] is required.

Only months before *Cantrell* was decided, the Court determined in *Gertz v. Robert Welch, Inc.*[63] that in defamation actions brought by private individuals, the states could impose liability on the publisher or broadcaster of defamatory falsehood on a "less demanding showing than that required by *New York Times.*"[64] The practical effect of *Gertz* was to enable those who are neither public officials nor public figures to recover

Appeals interpreted this to mean that there was no evidence of knowing falsity or reckless disregard (*New York Times* malice) and granted respondents a directed verdict. The Supreme Court, however, reversed the Court of Appeals, holding that the district judge based his decision on common law malice, rather than actual malice, and thus upheld the award on the basis that the trial judge was "not determining that Mrs. Cantrell had failed to introduce any evidence of knowing falsity or reckless disregard of the truth." *Id.* at 252.

59. *New York Times Co.*, 376 U.S. at 271-72.

60. For example, in Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971), a newspaper falsely reported that a mayor had been charged with serious crimes, when the mayor's brother was the person actually accused. The editor assumed, without checking, that the reporter had written the wrong first name, and because he had not heard of the brother, but only the mayor, changed the copy. The Supreme Court overturned the jury's verdict in favor of the mayor, holding that the rule of *New York Times* applies to a discussion of public officials. 401 U.S. at 299-300. *See also* Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); Saint Amant v. Thompson, 390 U.S. 727 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); Henry v. Collins, 380 U.S. 356 (1965).

61. In Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (consolidated with *Associated Press v. Walker*), the Supreme Court unanimously held that as with public officials, public figures must also prove actual malice. The Court, however, divided five to four in holding that Butts, an athletic director of the University of Georgia, had been maliciously libeled by an article in the *Saturday Evening Post* accusing him of providing valuable information about his team's strategy to the opposing coach in an important football game. The court awarded Butts $460,000 in damages. 388 U.S. at 138.

62. The negligence test may be broadly described as permitting recovery on a showing that in publishing a defamatory falsehood the defendant knew, or in the exercise of reasonable care should have known, that the statement was false or would create a false impression in some material respect. *See* Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 43 Ohio App. 2d 105, 110, 334 N.E.2d 494, 498 (1974); Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 445, 546 P.2d 81, 85 (1976).

63. 418 U.S. 323 (1974).

64. *Id.* at 348.

in defamation actions on a showing of mere negligence, a significantly easier standard to meet than actual malice.[65]

Mrs. Cantrell was indisputably a private person for purposes of her suit. She had not sought notoriety by injecting herself into a public controversy as required by Supreme Court defamation cases.[66] Because of the many similarities between defamation and false-light privacy,[67] the Court could well have applied the *Gertz* standard to *Cantrell,* thus allowing private plaintiffs bringing false-light privacy suits to prove whatever standard was formulated by the jurisdiction for defamation actions.[68] Such an extension seems all the more logical when one considers that negligence is subsumed under malice: By proving malice, Mrs. Cantrell demonstrated that the newspaper was negligent.

The Supreme Court, however, never reached that issue. It concluded that the reporter in *Cantrell* must have known that a number of the statements in the article contained "calculated falsehoods," justifying the jury's conclusion that he had portrayed the Cantrells in a false light through "knowing or reckless untruth."[69]

65. *See* Labunski, *supra* note 15, at 100 n.56.

66. The Supreme Court, in a plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971), adopted the "public interest" test from *Hill* requiring that, in addition to public officials and public figures, private individuals involved in matters of public interest would also have to prove actual malice. The *Rosenbloom* Court focused on the status of the issue (whether it was a matter of legitimate public interest) rather than the actions of the plaintiff (whether the plaintiff had voluntarily become involved in a public controversy). *Id.* at 43-45. The Supreme Court jettisoned the *Rosenbloom* public interest test in its opinion in *Gertz,* creating instead a public figure/private person test that turns on the status of the plaintiff, not the nature of the issue. Then, in *Cantrell,* the Court effectively applied the *Hill/Rosenbloom* public interest test to false-light privacy cases involving private persons involved in matters of public interest, largely ignoring the public figure/private person test in *Gertz.*

67. Both defamation and false-light privacy require proof that the matter publicized is false. In both causes of action, a court should consider the context in which the statement was made. Several jurisdictions, including Arkansas and Kentucky, allow a plaintiff to bring defamation and privacy actions based on the same facts.

68. This is what New York did in Fils-Aime v. Enlightenment Press, Inc., 133 Misc. 2d 559, 507 N.Y.S.2d 947 (N.Y. Sup. Ct. 1986), wherein the court recognized the similarity of issues raised in defamation and privacy claims, holding that the standard of care applicable to a private plaintiff in a defamation action should determine a media defendant's liability in a privacy action.

69. Cantrell v. Forest City Publishing Co., 419 U.S. 245, 253 (1974). The U.S. Court of Appeals for the Sixth Circuit reached the opposite conclusion in Cantrell v. Forest City Publishing Co., 484 F.2d 150 (6th Cir. 1973), *rev'd,* 419 U.S. 245 (1974):

> Although Mrs. Cantrell and her son were displeased with the article published by the *Plain Dealer* and the article was not as carefully written as it should have been, nevertheless there was no proof that the [newspaper] printed and distributed the article with any knowledge of the falsities contained in it or in reckless disregard of whether or not it was true. . . . The failure of the defendant . . . to verify the factual assertions in the story is not condoned, but there was no evidence of calculated falsehood.

484 F.2d at 157. The Supreme Court avoided the issue of what a private person plaintiff must prove in another privacy case, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), by hold-

There is much irony in Mrs. Cantrell's success in overcoming the actual malice barrier. If Mrs. Cantrell had been able to prove only negligence, it is likely that the Supreme Court would have applied the lower standard of *Gertz* to her case. Therefore, the Court is mistaken when it says that *Cantrell* presented no occasion on which to apply *Gertz*. It actually presented the only opportunity the Court has had to make that logical determination. Because she was able to prove actual malice, the Supreme Court found that the facts of *Cantrell* did not require a decision on the applicability of *Gertz*:

> [T]his case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases.[70]

The failure to extend *Gertz* to *Cantrell* has created widespread confusion in lower courts. The standard applied in private person false-light privacy cases varies not only from one state to another, but sometimes within the same state. Judges attempting to reconcile *Gertz* and *Cantrell* have had to speculate as to the standard the Supreme Court would have imposed if it had used *Cantrell* to apply *Gertz* to private person false-light privacy cases.[71] The result is that no national standard exists for balancing the conflicting, but nevertheless compelling, interests of news organizations to publish information about individuals and the rights of private

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ing that a television station could broadcast information (the name of a rape and murder victim) legally obtained from a public record. 420 U.S. at 487-97. The essence of a false-light privacy claim is that the "matter published is not true," and is such "a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position." RESTATEMENT (SECOND) OF TORTS § 652E comments a, c (1977).

70. *Cantrell*, 419 U.S. at 250-51. The Court added the following sentence: "Rather, the sole question that we need decide is whether the Court of Appeals erred in setting aside the jury's verdict." *Id.* at 251. The Court's analysis centered on whether the trial judge had instructed the jury under the constitutional malice standard brought forward from *New York Times* to *Hill*, or whether the instructions centered on common-law malice, which differs from the federal constitutional standard. The Court concluded that the district judge was fully aware that the *Hill* meaning of the *New York Times* standard had to be satisfied for the Cantrells to recover damages and was correct in finding that the actual malice standard had been met. *Id.* at 252. The trial judge had dismissed the punitive damages claim.

71. A typical statement recognizing the inconsistency between *Hill* and *Gertz* was made by the Kentucky Supreme Court in McCall v. Courier-Journal & Louisville Times, 623 S.W.2d 882 (Ky. 1981):

> Whether *Gertz* will be used to modify *Time, Inc. v. Hill* is only speculation. Until the Supreme Court has spoken, we must comply with the ruling in *Hill*, and recovery is predicated on the standards set therein. In the event the *Gertz* rule is applied, we believe the desirable standard of fault is that of simple negligence which we have adopted in this opinion for libel cases.

Id. at 888.

persons to be compensated for harm caused by irresponsible reporting. After sixteen years, there is still no federal constitutional rule establishing the standard for such cases.

B. After *Cantrell:* Inconsistency in Applying *Hill* to Private Person Plaintiffs

The restraint exercised by the Supreme Court in *Cantrell* has allowed lower courts wide discretion to determine the standard of liability for false-light privacy plaintiffs.

Courts in a number of states have obediently applied *Hill* by requiring private person plaintiffs to prove actual malice.[72] Other courts seemingly adopt *Hill's* actual malice standard for false-light privacy cases without actually saying so.[73] Still other courts have applied the actual malice standard by adopting the *Restatement* rule that a false-light invasion occurs if "(a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."[74] Clearly, the second arm of this test represents the actual malice standard, and jurisdictions which use the *Restatement* rule are effectively following *Hill.*[75] Several courts have expressed reluctance in applying *Hill,* but obediently follow the Supreme Court's lead.[76]

72. *See generally* Fellows v. National Inquirer, 42 Cal. 3d 234, 721 P.2d 97, 228 Cal. Rptr. 215 (1986); McCammon & Assoc. v. McGraw-Hill Broadcasting Co., 716 P.2d 490 (Colo. Ct. App. 1986); Colbert v. World Publishing Co., 747 P.2d 286 (Okla. 1987); Lorentz v. Westinghouse Elec. Corp., 472 F. Supp. 946 (W.D. Pa. 1979).

73. *See* Cantrell v. American Broadcasting Corp., 529 F. Supp. 746 (N.D. Ill. 1981) (implicitly recognizing actual malice standard for private person plaintiffs in false-light privacy cases despite denying defendant's motion for summary dismissal); Uhl v. Columbia Broadcasting Sys., 476 F. Supp. 1134 (W.D. Pa. 1979) (holding that invasion of privacy claims are subject to the constitutional standard set out in *New York Times,* but adding that for false-light cases, actual malice must be distinguished from common law malice, based on *Cantrell v. Forest City Publishing Co.*).

74. *See* RESTATEMENT (SECOND) OF TORTS § 652E (1977). See *infra* note 75 for citations to courts that have followed the *Restatement* rule.

75. *See generally* Dempsey v. National Enquirer, 687 F. Supp. 692 (D. Me. 1988); Cibenko v. Worth Publishers, 510 F. Supp. 761 (D.N.J. 1981); Goodrich v. Waterbury Republican-American, 188 Conn. 107, 448 A.2d 1317 (1982); Prescott v. Bay St. Louis Newspapers, 497 So. 2d 77 (Miss. 1986); Dean v. Guard Publishing Co., 88 Or. App. 192, 744 P.2d 1296 (1987).

76. *See* Dodrill v. Arkansas Democrat Co., 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied,* 444 U.S. 1076 (1980) ("The [Supreme Court] consciously abstained from examining the status of [*Hill*] in light of [*Gertz*]. It is the duty of this court to follow the mandate of [*Hill*] until the rule announced therein has been modified or overruled." *Id.* at 639 n.9, 590 S.W.2d at 845 n.9); McCall v. Courier-Journal & Louisville Times, 623 S.W.2d 882, 888 (Ky. 1981) (recognizing the differing standards of liability as a "gray area," but holding, nevertheless, that "[u]ntil the Supreme Court has spoken, we must comply with the ruling in *Hill*").

Where defamation and privacy actions can arise from the same facts, as in Kentucky[77] and Arkansas,[78] inconsistent standards of liability are especially troublesome, confounding logic and rationality. On a practical level, the differing standards provide a tangible incentive for private plaintiffs to file defamation actions rather than privacy actions.

A second group of jurisdictions has not yet considered whether private plaintiffs in privacy cases should prove negligence or actual malice, but have applied the *Hill* rule in cases involving public figures.[79]

A third group of jurisdictions may be deemed "rebellious," having rejected the *Hill* rule by allowing private person plaintiffs in false-light privacy cases to recover upon a showing of negligence.[80] Courts in these jurisdictions have concluded that the Supreme Court will follow their lead and apply *Gertz* to false-light privacy when it has the opportunity. A typical approach of the "rebellious" jurisdictions was stated by Judge Green in *Dresbach v. Doubleday & Co.*[81]

> Although the Supreme Court has had no occasion to decide the matter, no reason appears to distinguish false light invasion of privacy actions from defamation actions in this regard. Since the District of Columbia applies a negligence standard to defamation actions involving private individuals, that standard should also be applied to a false light action.[82]

Some courts brazenly predict the future ruling of the Supreme Court on the issue. For example, a federal court in Kansas held that "because of the strong similarity between a false light claim and a defamation claim, the *Gertz* rule will replace the *Hill* rule in the area of false-light privacy."[83] Similarly, the West Virginia Supreme Court of Appeals concluded as follows:

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77. *See McCall*, 623 S.W.2d 882 (Ky. 1981).

78. *See Dodrill*, 265 Ark. 628, 590 S.W.2d 840. Arkansas, however, allows only one recovery for any particular publication.

79. These jurisdictions include Tennessee, Washington, and the Second and Fourth Circuit Courts of Appeals. *See* Machleder v. WCBS-TV, 801 F.2d 46 (2d Cir. 1986); Fitzgerald v. Penthouse Int'l, 691 F.2d 666 (4th Cir. 1982); Roberts v. Dover, 525 F. Supp. 987 (M.D. Tenn. 1981); Hoppe v. Hearst Corp., 106 Wash. 2d 466, 722 P.2d 1295 (1986).

80. These jurisdictions include the District of Columbia, Kansas, Michigan, West Virginia, New York, and the Fifth Circuit Court of Appeals. *See* Braun v. Flynt, 726 F.2d 245 (5th Cir. 1984); Wood v. Hustler Magazine, Inc., 736 F.2d 1084 (5th Cir. 1984); Dresbach v. Doubleday, 518 F. Supp. 1285 (D.D.C. 1981); Rinsley v. Brandt, 446 F. Supp. 850 (D. Kan. 1977), *aff'd*, 700 F.2d 1304, 1307 (10th Cir. 1983); Deitz v. Wometco West Michigan TV, 160 Mich. App. 367, 407 N.W.2d 649 (1987); Fils-Aime v. Enlightenment Press, Inc., 133 Misc. 2d 559, 507 N.Y.S. 947 (N.Y. Sup. Ct. 1986) (requiring a showing of gross negligence for private person plaintiffs in both false light privacy and defamation claims); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70 (W. Va. 1984).

81. 518 F. Supp. 1285 (D.D.C. 1981).

82. *Id.* at 1288.

83. Rinsley v. Brandt, 446 F. Supp. 850, 854-56 (D. Kan. 1977), *aff'd*, 700 F.2d 1304, 1307 (10th Cir. 1983). It is interesting to note that the court relied in large measure on the

> Due to the pronounced overlap of defamation and false light invasion of privacy, particularly in the area of their first amendment implications, we conclude that the existing inconsistency between *Hill* and *Gertz* will eventually be resolved in favor of *Gertz*. In the absence of a privileged communication, the test to be applied in a false light invasion of privacy action by a private individual against a media defendant is what a reasonably prudent person would have done under the same or similar circumstances.[84]

Perhaps most influential of these "rebellious" jurisdictions is the Fifth Circuit, which has made two rulings that negligence is the standard in false-light privacy cases.[85] In the most recent case, the court noted that applicable state law was silent on the standard of care applicable to publishers in false-light privacy actions.[86] Furthermore, it noted that the authority of *Hill* had been undermined by *Gertz*.[87] It concluded,

> [W]e hold that *Gertz* applies equally to false-light and defamation cases, and that states are permitted, consistent with the [f]irst and [f]ourteenth [a]mendments, to impose liability for actual damages on publishers who negligently place private figures in an offensive light.[88]

This holding seems to conflict with the Fourth Circuit's view that the actual malice standard would apply and clearly controverts the numerous state court rulings that *Hill* is applicable.

Finally, several courts remain unconvinced that false-light privacy constitutes a distinct cause of action and have held that defamation standards suffice.[89] The North Carolina Supreme Court, in strongly rejecting

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similarity between Dr. Rinsley and Ronald Hutchinson, who later became a plaintiff in an important Supreme Court libel case. In *Rinsley*, the court noted that he had been on the staff of a children's hospital, while Hutchinson was the director of research at a state hospital. Hutchinson v. Proxmire, 431 F. Supp. 1311, 1327 (W.D. Wis. 1977), *aff'd*, 579 F.2d 1027 (7th Cir. 1978), *rev'd*, 443 U.S. 111 (1979). Two years later, the Supreme Court held that Hutchinson was a private person for the purpose of his defamation suit against Senator William Proxmire, who gave Hutchinson a "golden fleece" award for allegedly wasting taxpayer money. *See generally* Hutchinson v. Proxmire, 443 U.S. 111 (1979); Dresbach v. Doubleday, 518 F. Supp. 1285 (D.D.C. 1981).

84. Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 89 (W. Va. 1984).

85. Braun v. Flynt, 726 F.2d 245 (5th Cir. 1984) (holding that plaintiff who performed an act with a pig in an amusement park swimming pool was a private figure and need only prove negligence against a men's magazine which published her picture); Wood v. Hustler Magazine, Inc., 736 F.2d 1084 (5th Cir. 1984) (holding that a woman who posed nude for a picture taken by her husband that was later stolen by a neighbor and published in a men's magazine was a private person for purposes of a false-light privacy action and had to prove negligence).

86. *Wood*, 736 F.2d at 1091.

87. *Id.*

88. *Id.* at 1092.

89. *See generally* Angelotta v. American Broadcasting Corp., 820 F.2d 806 (6th Cir. 1987) (holding that state law expressly did not recognize false-light privacy as a separate cause of action); Sullivan v. Pulitzer Broadcasting Co., 709 S.W.2d 475 (Mo. 1986) (holding that state law did not recognize the tort of false light and that differences between it and defamation were largely "semantic"); Renwick v. News & Observer Publishing Co., 310 N.C. 312, 312 S.E.2d 405 (1984), *cert. denied*, 496 U.S. 858 (1984). This list is illustrative, not exhaustive. It

recognition of false-light privacy, is representative of these jurisdictions. The court determined that libel and privacy are so similar that to allow false-light privacy would either "duplicate an existing right of recovery for libel or slander or involve a good deal of overlapping with such rights."[90] Moreover, the court held that allowing such recovery would "tend to add to the tension already existing between the [f]irst [a]mendment and the law of torts in cases of this nature."[91]

III
Manipulation of the Common Law: Justification for Contiguous Decision-Making

Courts have much in common with parents who tell their children, "Do as I say, not as I do," in trying to dissuade their offspring from inappropriate behavior. Significant portions of judicial opinions are devoted to reminding the reader that courts are governed by strict rules, two of the most important being that precedents will be binding on the present case and that the holding will extend no further than the facts require. If case-by-case development of the common law is to provide identifiable rules, it is important that courts adhere to the principles of previous cases even when they do not accept them as persuasive.

What courts say and what they do, however, are not always the same. The common law's flexibility is one of its great virtues, but it is subject to manipulation by judges determined to reach a certain result, who then identify precedents and principles that justify the conclusion. All too often courts creatively sidestep their oft-stated principles by either ignoring precedents they find inconvenient or by giving the present case a spin that the most gifted contortionist would envy.

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demonstrates the disparate approaches that lower courts have taken in reaction to *Gertz* and *Cantrell*. North Carolina could be added to the list of states that have reluctantly applied *Hill*. Although it specifically does not recognize false light invasion of privacy, it impliedly held that *Hill* would govern.

90. *Renwick*, 310 N.C. at 323, 312 S.E.2d at 412. The court implied that if it accepted false-light privacy, it would require *New York Times* actual malice:

> Given the first amendment limitations placed upon defamation actions by [*New York Times*] and upon false light invasion of privacy actions by *Hill*, we think that such additional remedies as we *might* be required to make available to plaintiffs should we recognize false light invasion of privacy claims are not sufficient to justify the recognition in this jurisdiction of such inherently constitutionally suspect claims for relief.

Id. at 326, 312 S.E.2d at 413 (emphasis in original).

91. *Id.* at 323, 312 S.E.2d at 412. *See* Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962) (expressing concern over whether false light invasion of privacy would overwhelm existing laws of libel and slander); Time, Inc. v. Hill, 385 U.S. 374 (1967) (suggesting that libel and privacy actions are similar and many of the same considerations apply to each type of claim).

In short, courts frequently break the rules they have created. When interpreting the Constitution, judges at times seem more like robed legislators than jurists as they substitute their judgment for that of the other branches of government.[92] If courts historically had been more forthcoming about the violation of such rules, and acknowledged that constitutional interpretation involves substantial discretion, the proposal in this Article to grant them limited authority to go beyond the facts of a case would not be considered a controversial enlargement of judicial power.

A. Judicial Legislating in *Lochner:* Ignoring a Precedent

From Blackstone to the present day, courts have claimed allegiance to the principle that they are bound by authoritative precedents, regardless of their feelings about the soundness of the judgment made in previous cases. It is widely believed that allowing judges to ignore or circumvent relevant precedents jeopardizes the fragile legitimacy that courts need to function.

Numerous examples could be cited where the Supreme Court simply pretended that authoritative precedents did not exist. One of the most famous examples, in a non-first amendment case, illustrates judges' willingness to violate common-law rules in a way that is perhaps more egregious than any that would be available under the contiguous decision-making proposal offered in this Article.

Lochner v. New York[93] represents one of the Court's boldest efforts to use the due process clause of the fourteenth amendment to protect business. At issue was a New York law limiting bakery employees' hours to ten per day or sixty per week. The Court invalidated the law, reasoning that the right to make a contract "is part of the liberty of the individual protected by the [f]ourteenth [a]mendment," and that no state can deprive any person of such liberty without "due process of law."[94]

The Court recognized that it had approved laws limiting the number of hours that coal miners could work[95] and requiring compulsory vaccination.[96] Nevertheless, it held that the work done by a baker, "in and of

92. *See generally* R. BORK, *supra* note 3; L. TRIBE, *supra* note 8; B. SIEGAN, THE SUPREME COURT'S CONSTITUTION (1987).

93. 198 U.S. 45 (1905). Rehnquist calls *Lochner* "one of the most ill-starred decisions" that the Supreme court ever rendered. W. REHNQUIST, *supra* note 3, at 205. *See also* Morehead v. People *ex rel.* Tipaldo, 298 U.S. 587 (1936); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).

94. *Lochner,* 198 U.S. at 53. *See* S. NOVICK, *supra* note 7, at 280-82, 290. The same argument was used numerous times between 1887 and 1937 to invalidate state and federal laws that protected individuals in their work environment, wages, and other areas.

95. Holden v. Hardy, 169 U.S. 366 (1898).

96. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

itself, is not an unhealthy one to the degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee."[97] A more stark perversion of the purposes of the amendment than *Lochner* likely does not exist.

For this reason, perhaps, the Court felt compelled to address the issue of judicial "legislating" as follows:

> This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. . . . There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.[98]

In what may be the Supreme Court's most callous analogy, it suggested that if it allowed New York to limit the hours of bakers, the states would then want to legislate the hours and conditions of those working in banks, law firms, real estate, and other companies if there are complaints about the lack of sunlight in their office buildings.[99]

Justice Holmes, in one of his most famous dissents, wrote that "a constitution is not intended to embody a particular economic theory,"[100] and further argued that such a law should be upheld if there is any reasonable basis for it:

> I think the word liberty in the [f]ourteenth [a]mendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. . . . A reasonable man might think it a proper measure on the score of health.[101]

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97. *Lochner,* 198 U.S. at 59.

98. *Id.* at 56-57.

99. The Court wrote that "[n]o trade, no occupation, no mode of earning one's living, could escape this all-pervading power . . . of the legislature." *Id.* at 59-60. The Court further wrote as follows:

> In our large cities there are many buildings into which the sun penetrates for but a short time in each day. . . . Upon the assumption of validity of this act under review, it is not possible to say that an act, prohibiting lawyers or bank clerks, or others, from contracting to labor for their employers more than eight hours a day would be invalid.

Id.

100. *Id.* at 75 (Holmes, J., dissenting).

101. *Id.* at 76 (Holmes, J., dissenting). Justice Harlan more directly chastised the Court for legislating as follows:

> No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives.

Lochner set a precedent that seemed hard to ignore. Yet three years after *Lochner*, the Court in *Muller v. Oregon*[102] unanimously upheld an Oregon law that limited the number of hours women could work in "any mechanical establishment, or factory, or laundry." The Court rejected arguments that *Lochner* was controlling, saying "this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor."[103]

Lochner was further undermined, if not overruled, in *Bunting v. Oregon*,[104] when the Court approved an Oregon law establishing a ten-hour maximum workday for both men and women.[105] Remarkably, *Bunting* does not even mention *Lochner*. The Court seemed to adopt Holmes' "reasonable man" theory from his *Lochner* dissent: "It is enough for our decision if the legislation under review was passed in the exercise of any admitted power of government."[106]

Muller and *Bunting* suggested that *Lochner* had lost much of its authority, and *Bunting's* failure to even mention *Lochner* led some to believe it had been overruled. That made the Court's invalidation of a minimum wage law for women in *Adkins v. Children's Hospital*[107] all the more surprising.

In *Adkins*, the Court unabashedly upheld the freedom of contract under the fourteenth amendment without expressing any concern for the special needs of women. The Court ruled that the statute was "simply and exclusively a price-fixing law, confined to adult women . . . who are legally as capable of contracting for themselves as men."[108] Refusing to consider the setting of minimum wages to be similar to the setting of hours, the Court held that the statute violated the Constitution and that invalidating such a law is "a plain exercise of the judicial power."[109] The Court tried to argue that it was not invalidating the law on "substantive" grounds, but was instead merely rejecting an "inferior act of legislation," which, by conflicting with the Constitution, "is of no effect, and binding on no one."[110]

Id. at 74 (Harlan, J., dissenting).

102. 208 U.S. 412 (1908).

103. *Id.* at 419.

104. 243 U.S. 426 (1917).

105. The statute, thought to include bakeries, read in part: "No person shall be employed in any mill, factory or manufacturing establishment in this state more than ten hours in any one day." *Id.* at 433-34. The law provided several exceptions, such as allowing overtime not to exceed three hours in any one day, unless the wages were paid at time and a half.

106. *Bunting*, 243 U.S. at 437.

107. 261 U.S. 525 (1923).

108. *Id.* at 554.

109. *Id.* at 544.

110. *Id.* The Court denied it was exercising arbitrary powers:

Chief Justice Taft argued in dissent that *Muller* was controlling, seeing no difference between regulating maximum hours and minimum wages.[111] Taft recognized that the Court in *Bunting* had sustained a law limiting the hours of any person working in any mill or factory or manufacturing establishment, without mentioning *Lochner.*[112] He criticized the confusion the Court had created, concluding that there is no "constitutional distinction between employment in a bakery and one in any other kind of manufacturing establishment which should make a limit of hours in the one invalid, and the same limit in the other permissible."[113] Unable to reconcile *Bunting* and *Lochner,* Taft stated, "I have always supposed that the Lochner case was thus overruled *sub silentio.*"[114]

B. Manipulating the Common Law to Gather Votes

The Supreme Court may also ignore precedents in order to avoid offending members of the Court whose votes are needed in a particular case. This form of manipulation of the common law demonstrates the lengths to which the Court will reach in order to achieve certain ends.

A case in point is *Grovey v. Townsend,*[115] where the Court held that party primaries were outside the protection of the Constitution. The case arose when a county clerk refused to give a black voter a ballot in the Texas Democratic primary. Justice Roberts wrote for the Court that political parties could determine their own membership and were voluntary associations, holding that the legislature "has never attempted to prescribe or to limit the membership of a political party, and it is now settled that it has no power so to do."[116]

The Court further rejected arguments that, since the Democratic party dominated state politics, and the winner of the primary almost al-

> This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law.

Id.

111. *Id.* at 563 (Taft, C.J., dissenting).

112. *Id.* at 563.

113. *Id.* at 564.

114. *Id.* Holmes, in dissent, expressed some misgivings about the law, but they were irrelevant according to his standard of judicial review: "When so many intelligent persons have studied the matter more than any of us can, . . . it seems to me impossible to deny the belief reasonably may be held by reasonable men." *Id.* at 568 (Holmes, J., dissenting). *See* Morehead v. Tipaldo, 298 U.S. 587 (1936) (the four surviving members of the *Adkins* majority joined with Justice Roberts to invalidate a New York law that attempted to add a "value of service" feature to a minimum wage law); *see also Morehead,* 298 U.S. at 631 (Stone, J., dissenting). *See generally* Frankfurter, *Mr. Justice Roberts,* 104 UNIV. PA. L. REV. 311 (1955).

115. 295 U.S. 45 (1935).

116. *Id.* at 52-53.

ways was elected in the general election, blacks could not be prevented from participating in the primary. The Court determined that this would "confuse the privilege of membership in a party with the right to vote for one who is to hold public office."[117]

Six years later, Justice Stone needed Justice Roberts' vote in *U.S. v. Classic,*[118] which held that federal primary elections were subject to congressional regulation. He avoided offending Roberts by deliberately omitting any reference to *Grovey*. In directly refuting the holding in *Grovey,* Stone found that the primary was an integral part of choosing a member of Congress, and "the right of qualified voters to vote at the congressional primary . . . is thus the right to participate in that choice."[119]

Three years later, in *Smith v. Allwright, Election Judge,*[120] Stone no longer needed Roberts' vote and held that *Grovey* had been dead ever since *Classic*. *Smith,* like *Grovey,* involved the exclusionary practice of denying blacks the right to vote in primaries. Holding that such a practice violates the fourteenth amendment, the Court vindicated *Classic:* "It may now be taken as a postulate that the right to vote in such a primary . . . is a right secured by the Constitution."[121] This provoked an angry protest from Justice Roberts:

> If this court's opinion in the *Classic* case discloses its method of overruling earlier decisions, I can only protest that, in fairness, it should rather have adopted the open and frank way of saying what it was doing than, after the event, characterizing its past action as overruling *Grovey v. Townsend* though those less sapient never realized the fact.[122]

117. *Id.* at 54-55; *see also* Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

118. 313 U.S. 299 (1941).

119. *Id.* at 314. The Court concluded that, "The right of voters at the primary to have their vote counted is . . . a right or privilege secured by the Constitution." *Id.* at 325.

120. 321 U.S. 649 (1944).

121. *Id.* at 661-62. The Court added, "In reaching this conclusion, we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. . . . *Grovey v. Townsend* is overruled." *Id.* at 665-66 (footnote omitted).

122. *Id.* at 670 (Roberts, J., dissenting). Roberts added,

> It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, . . . should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions.

Id.

C. Manipulating the Common Law: When Dicta Become Holding

Near v. Minnesota[123] was the Supreme Court's first important anticensorship decision. A closely divided Court held unconstitutional a law that provided for the abating, as a public nuisance, of "malicious, scandalous and defamatory" newspapers or periodicals and the enjoining of anyone maintaining such a nuisance.[124] With reference to the writings of Blackstone and the history of the first amendment, Chief Justice Hughes concluded that freedom of the press prohibited prior restraint in all but exceptional cases.[125] After quoting Holmes in *Schenck v. United States*[126] to the effect that the first amendment may be interpreted differently during war as opposed to peace, Hughes wrote as follows:

> No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not protect a man from an injunction against uttering words that may have all the effect of force. These limitations are not applicable here.[127]

Both the Hughes and Holmes statements are clearly dicta. They were not necessary to deciding that the Minnesota statute allowing such an injunction against a publisher is an unconstitutional prior restraint. There was no need for Hughes to describe the circumstances under which prior restraint would be constitutional. Nevertheless, those words became the standard by which a subsequent prior restraint case was decided.[128]

Four decades after *Near,* the Supreme Court had to determine whether injunctions issued against the *Washington Post* and the *New*

123. 283 U.S. 697 (1931).

124. *Id.* at 701-02 (Hughes, J., writing for the court).

125. Quoting Blackstone, the Court held as follows:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.

Id. at 713-14 (emphasis in original).

126. 249 U.S. 47, 52 (1919). Holmes wrote, "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Id.* (Holmes, J., writing for the court).

127. Near v. Minnesota, 283 U.S. 697, 716 (1931) (Hughes, J., writing for the Court).

128. *See* United States v. Progressive, 467 F. Supp. 990 (W.D. Wis. 1979), *dismissed,* 610 F.2d 819 (7th Cir. 1979).

York Times, preventing them from further publishing the Pentagon Papers, were unconstitutional prior restraints. In *New York Times Co. v. United States,*[129] the Court in a per curiam opinion overturned the injunctions against the newspapers. Several concurring opinions interpreted *Near* as having repudiated the argument that the government has inherent powers to obtain an injunction to protect the national interest.[130]

Justice Brennan, in his concurring opinion, went even further in treating the dicta in *Near* as authoritative. After quoting Holmes' *Schenck* opinion, which was cited in *Near,* Brennan observed the following:

> Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature.[131]

In dissent, Chief Justice Burger did not treat the *Near* dicta as authoritative. After stating that the first amendment was not absolute, and referring to Holmes' aphorism concerning the right to shout "fire" in a crowded theatre, Burger wrote, "There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near v. Minnesota.*"[132]

Burger's "by way of example" statement in *New York Times* became the *ratio decidendi* by which a federal district court less than a decade later granted an injunction against a magazine that wanted to publish an article detailing how to make a hydrogen bomb. In *United States v. Progressive,*[133] Judge Warren carefully traced the development of the first amendment, and its implications for prior restraint. In that opinion, Judge Warren completed the transformation of *Near*'s dicta into authoritative holding, stating as follows:

> In *Near v. Minnesota,* the Supreme Court specifically recognized an extremely narrow area, involving national security, in which interference with [f]irst [a]mendment rights might be tolerated and a prior restraint on publication might be appropriate. . . .

129. 403 U.S. 713 (1971). *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

130. 403 U.S. at 723 (Douglas, J., concurring).

131. *Id.* at 726 (Brennan, J., concurring).

132. *Id.* at 749 (Burger, C.J., dissenting). Burger added, "There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably such exceptions may be lurking in these cases and would have been flushed out had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures." *Id.*

133. 467 F. Supp. 990 (W.D. Wis. 1979), *dismissed,* 610 F.2d 819 (7th Cir. 1979).

> . . . [I]t is clear that few things, save grave national security concerns, are sufficient to override [f]irst [a]mendment interests.
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> . . . .
>
> . . . [T]his Court concludes that publication of the technical information on the hydrogen bomb contained in the article is analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint.[134]

What began as dicta in 1931 thus became the *ratio decidendi* by which *Progressive* was decided. Even more importantly, this half-century old dicta has become the constitutional standard by which exceptions to the prior restraint rule are judged.

IV
Creating the Principle of "Contiguous Decision-Making" and Applying It to False-Light Privacy

As the above discussion has demonstrated, granting courts the authority to extend the holding of a case beyond the facts in first amendment cases would not be a radical departure from present practice. The difference will be that judges will specifically identify sections of an opinion that are not essential to the court's holding but will nevertheless have the force of law.

Creating the principle of "contiguous decision-making" and applying it to first amendment cases faces several obstacles. But despite the problems, such a principle may be required when the alternative is an interminable delay in settling important first amendment issues. The principle can be carefully applied and will thus not fundamentally change the authority that courts now exercise.

A. Cases and Controversies

The jurisdiction of the federal courts is constitutionally limited to "cases" and "controversies."[135] The courts will not exert their power and risk their prestige to answer hypothetical, academic, or abstract questions or to hand down a decision where a judgment can have no practical effect.[136] The requirement of a case or controversy is also cited by judges as a reason for refusing to give advisory opinions. The Court

134. *Id.* at 992, 996 (Warren, J., writing for the Court) (citations omitted). Judge Warren understood the unprecedented nature of his decision. He noted that the injunction "constitute[d] the first instance of a prior restraint against a publication in this fashion in the history of this Country," but he concluded that the government had met its heavy burden. *Id.* at 996.

135. U.S. CONST. art. III, § 2, cl. 1.

136. W. MURPHY & C. PRITCHETT, *supra* note 5, at 183.

has, nevertheless, occasionally offered such opinions in the form of dicta.[137]

Allowing courts to extend the holding of a case beyond the facts is not a violation of the cases and controversies clause. Such action is not an advisory opinion in which another branch of government or litigants ask the court what they should do in order to win eventual court approval. It is also not a declaratory judgment action, sometimes confused with advisory opinions.[138]

Contiguous decision-making would also not constitute "friendly suits" in which the interests of the opposing parties are actually not adverse,[139] or "test cases" which have been so carefully engineered for judicial review that the Supreme Court will refuse to accept them.[140] It would also not have any effect on the issue of standing.[141]

137. *See* Hill v. Wallace, 259 U.S. 44, 68 (1922) (holding that a federal law regulating transactions in grain futures was unconstitutional but suggesting that Congress pass a new law based on evidence that there is direct interference with interstate commerce). The new law, Grain Futures Act, was upheld in Board of Trade v. Olsen, 262 U.S. 1 (1923). In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), the Court held that an admission policy that reserved a fixed number of places for minorities at the UC Davis Medical School was unconstitutional. 438 U.S. at 320. Justice Powell indicated that the kind of affirmative action program used at Harvard University was constitutionally acceptable. *Id.* at 316-18.

138. In 1934, Congress passed the Federal Declaratory Judgment Act authorizing the federal courts to declare rights and other legal relations in cases of "actual controversy," and providing that such declaration shall have the force and effect of a final judgment or decree and be reviewable as such. 28 U.S.C. § 2201 (1988). The act was upheld in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). *See also* Steffel v. Thompson, 415 U.S. 452 (1974); Public Affairs Assocs. v. Rickover, 369 U.S. 111 (1962).

139. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). In Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936), the Court declined to permit constitutional issues to be raised by the device of stockholders' suits.

140. *See* Muskrat v. United States, 219 U.S. 346 (1911) (holding that no actual controversy existed between federal government and Cherokee Indians over land rights). *But see* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (stating that an actual controversy did exist over efforts to deport an alien).

141. The Court has historically required that in order to establish standing, the interests of the parties must be personal and not shared with all other citizens generally, and that the interest being defended is a legally protected interest, or right, which is immediately threatened by government action. *See* Alabama Power Co. v. Ickes, 302 U.S. 464 (1938) (denying standing to power company to enjoin Public Works Administration from building municipal power systems competing with the private company); Frothingham v. Mellon, 262 U.S. 447 (1923) (denying a taxpayer standing to seek enjoining of congressional statute providing grants to states for infant mortality programs); *see also* Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982) (denying right of group to challenge transfer of Army hospital to a religious college for no compensation); Warth v. Seldin, 422 U.S. 490 (1975) (denying standing to group challenging zoning ordinance); United States v. Richardson, 418 U.S. 166 (1974) (holding that group lacked standing to force the secretary of the treasury to publish the budget of the CIA); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (denying citizens' group suit against members of Congress who hold commissions in the Armed Forces Reserves); Sierra Club v. Morton, 405 U.S. 727

B. Briefing on Contiguous Issues

It is widely accepted that courts can only rule on points that have been specifically argued by the opposing parties. It is assumed that the clash of opposing arguments will expose courts to all relevant issues and lead to fair and just decisions. This view makes many assumptions, including that the opposing sides are equally capable, in terms of financial and intellectual resources, to argue their case.

Under contiguous decision-making, a court would initially receive traditional briefs asking it to formulate a rule based on the facts. Opposing counsel would also prepare and submit briefs on "contiguous" issues that are closely related to previously settled matters, and are relevant to the facts of the present case, but are not directly based on them. The second briefs will be submitted before oral argument so the court can explore with the opposing attorneys just how far beyond the facts it should venture. The court would then be informed not only of issues directly emanating from the facts, but also of those based on contiguous principles.

C. Writing Opinions

Under current procedure, portions of the opinion not based directly on the facts are rarely specifically identified as such. Contiguous decision-making would help identify those parts of the cases that are dicta, and those that are *ratio decidendi.*

Judges in appellate courts may want to take one vote on sections dealing with the facts and holding, and another vote on peripheral issues. The opinion would then be divided into two portions, each having precedential value.[142] The advantage is that lower courts and litigants will

(1972) (denying standing to Sierra Club to challenge proposed ski resort); Laird v. Tatum, 408 U.S. 1 (1972) (denying standing to plaintiffs challenging Army's surveillance program of civilian political activities). *But see* Flast v. Cohen, 392 U.S. 83 (1968) (upholding taxpayer's right to sue to test grants to religious schools); Hardin v. Kentucky Utils. Co., 390 U.S. 1 (1968) (allowing utility company that had virtual monopoly to challenge Tennessee Valley Authority plan to offer cheaper power); Coleman v. Miller, 307 U.S. 433 (1939) (upholding standing of Kansas state senators to bring suit over tie-breaking vote of lieutenant governor); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (upholding standing for religious school challenging Oregon law requiring children to be sent to public schools); *but see also* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) (upholding right to sue of group challenging the Interstate Commerce Commission policy that interfered with recycling operations); Peters v. Kiff, 407 U.S. 493 (1972) (holding that white man challenging the exclusion of blacks from the grand jury had standing); Barrows v. Jackson, 346 U.S. 249 (1953) (upholding standing of California property owner who broke racially restrictive covenant).

142. This system may seem cumbersome, but it cannot be worse than the undermining of judicial authority that takes place when lower courts virtually ignore majority Supreme Court opinions, and openly adopt the standards formulated in the dissent. *See, e.g.*, cases rejecting or

know not only the standards emanating from the facts, but also the court's interpretation of the Constitution on related issues.

D. Applying "Contiguous Decision-Making" to False-Light Privacy

The purpose of contiguous decision-making is not to grant the judiciary unbridled authority to act as a "super-legislature" by substituting the courts' judgment on first amendment issues for those of the people through their elected representatives. As has been demonstrated, the courts already have ample authority to do so if they choose. Nor does this allow judges the authority to ignore relevant precedent and write their own opinions into law. This proposed decision-making authority is no more unsettling to the legal system than are currently-existing manipulations of the common law, such as ignoring precedents and transforming dicta into *ratio decidendi.*[143]

Contiguous decision-making would be based on several principles:

1) Contiguous decision-making will be limited to first amendment cases or those which materially affect freedom of speech and press.

False-light privacy clearly falls within the category of cases involving first amendment freedoms. Freedom of speech and press are essential if a democratic society is to function and have been placed in a "preferred position" in relation to other constitutional rights. The liability of news organizations in defamation and invasion of privacy suits directly affects their ability to disseminate information and is among the most urgent of first amendment concerns.[144]

2) Contiguous decision-making will extend the holding of a case beyond the facts only if a precedent has laid the groundwork for such an extension.

Requiring contiguous decision-making to be based on a relevant precedent gives it the "contiguous" quality. It is merely the extending of the

distinguishing Branzburg v. Hayes, 408 U.S. 665 (1972), and essentially adopting the dissenting opinion of Justice Stewart: LaRouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986); United States v. Burke, 700 F.2d 70 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983); McGraw-Hill v. Arizona, 680 F.2d 5 (2d Cir. 1982); Riley v. Chester, 612 F.2d 708 (3d Cir. 1979); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973); State v. Rinaldo, 102 Wash. 2d 749, 689 P.2d 392 (1984); Clampitt v. Thurston County, 98 Wash. 2d 638, 658 P.2d 641 (1983); Senear v. Daily Journal Am., 97 Wash. 2d 148, 641 P.2d 1180 (1982).

143. For discussions of *Lochner, Grovey, Near,* and *Progressive,* see *supra* text accompanying notes 93-101, 115-22, 123-25, and 133-34, respectively.

144. *See generally* R. LABUNSKI, *supra* note 44; R. BEZANSON, supra note 23; R. SMOLLA, SUING THE PRESS (1986).

holding into an area that is a direct outgrowth of an already settled area of law. For example, when the Supreme Court determined in *Gertz* that a private person libel plaintiff did not have to prove actual malice, and the majority of the states reacted by allowing recovery in cases of negligence, it laid the foundation for application of the principle to privacy.

Adding an additional sentence to *Cantrell* to the effect that private persons bringing privacy actions must prove whatever the state standard is for defamation plaintiffs would not have plunged the Supreme Court into constitutional crisis. It would not have generated cries of imperial judiciary. It would, in fact, have been uncontroversial when compared to some of the Court's actions in the past that have deservedly precipitated constitutional crises.

The requirement of contiguousness also would prevent courts from ruling on issues in an unrelated area of law. The Court in *Cantrell,* for example, could not have leaped to the point of asserting that false-light privacy no longer exists as a separate cause of action. Such an issue is clearly not contiguous to *Gertz.* Because standard of liability is an issue directly emanating from *Gertz,* the Court could have ruled that *Gertz*'s standard would apply to false-light cases.

3) Contiguous decision-making will allow the Court to anticipate important first amendment questions.

First amendment cases occupy an important, but relatively minor, portion of the Supreme Court's time. Contiguous decision-making recognizes that first amendment questions left unsettled by the case at hand may remain so for years. For example, the standard of liability in false-light privacy cases involving private person plaintiffs has been left unsettled for sixteen years. There is no indication that the Court will, in the foreseeable future, be able to resolve this question. While supporters of the first amendment may applaud such inaction in this case because media organizations enjoy greater protection from false-light suits in those jurisdictions that apply *Hill,* there is a larger question about the viability of the first amendment: Should it mean something different in every state?

In an era where supporters of a free press have viewed the Supreme Court as hostile to first amendment claims, there has been an effort to reinvigorate freedom of speech and press provisions of state constitutions and to seek relief in state courts.[145] Those efforts have resulted in widely

145. *See generally* Kolbert, *In Civil Liberties Cases, New York's Court Leans on the State Constitution,* N.Y. Times, Jan. 8, 1990, at A12, col. 1.

varying standards being applied in first amendment cases.[146] Moreover, because many news organizations transmit their articles and broadcasts across state lines, the first amendment should be enforced through national standards, and litigants should not be able to search for the judicial forum most hostile to first amendment interests.[147]

The Supreme Court must have known that its refusal to apply *Gertz* would leave the status of *Hill* unsettled for private person plaintiffs. It must have also known that lower courts would come to widely varying conclusions about the standard for private persons. Even in a federal system that both appreciates and respects the role of states, subjecting the first amendment to state-by-state adjudication cannot be characterized as protective of the freedoms guaranteed under the amendment.

4) Contiguous decision-making will be used to extend the holding beyond the facts in a case only if there is sufficient precedent.

The establishment of new legal principles, through either traditional or contiguous decision-making, requires a firm basis in precedent. Without such precedent, the application of contiguous decision-making would be inappropriate. The case of *Branzburg v. Hayes*[148] illustrates this point. In *Branzburg*, the Supreme Court narrowly held that journalists do not have a constitutional right to withhold information about a crime from law enforcement authorities, even if that means revealing the names of confidential sources.[149]

Unfortunately, *Branzburg* involved an unrepresentative set of circumstances. The reporter actually witnessed a crime being committed, namely the production and possession of illegal drugs. Under more common circumstances, journalists report on crimes they have been told about but did not actually witness themselves.

Because of the unusual facts of the case and the limiting effect of a concurring opinion recognizing a reporter's privilege in certain circum-

146. Such a contrast can be seen by comparing Washington state and Pennsylvania in defamation cases. Pennsylvania courts have been most hospitable to even public official plaintiffs suing news organizations for allegedly defamatory statements made about their official duties. *See* Labunski, *supra* note 15, at 90. Washington, on the other hand, has been very protective of news organizations, even creating "shield protection" against forcing reporters to reveal the names of sources that is more expansive than anything the legislature would have considered. *See* State v. Rinaldo, 102 Wash. 2d 749, 689 P.2d 392 (1984); Clampitt v. Thurston County, 98 Wash. 2d 638, 658 P.2d 641 (1983); Senear v. Daily J.-Am., 97 Wash. 2d 148, 641 P.2d 1180 (1982).

147. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Calder v. Jones, 465 U.S. 783 (1984).

148. 408 U.S. 665 (1972).

149. *Id.* at 690.

stances,[150] lower courts have often ignored the majority opinion and adopted the three-part test mentioned in two dissenting opinions.[151]

Even in this situation, however, contiguous decision-making could not be employed because there was no ample precedent leading the Supreme Court to establish such a privilege for reporters. The Court could not, for example, have said that "in cases in which the reporter does not witness a crime, such a privilege exists."

Although the confusion that resulted from *Branzburg* is similar to the problems created by *Hill*, *Gertz*, and *Cantrell*, correction of *Branzburg* by contiguous decision-making would have required too drastic a leap in reasoning. Yet in both circumstances, some lower courts have used the confusion to provide greater first amendment protection than the Supreme Court formulated.

5) Contiguous decision-making will allow the Supreme Court to clarify issues that have already created confusion in the lower courts, including inter-jurisdictional disputes, even if the facts of the case at hand do not directly address those conflicts.

In several important first amendment areas, the Supreme Court has refused to resolve conflicting decisions by different federal circuits. Even when it had granted certiorari and heard arguments in an important case that provided the Court with the opportunity to make a definitive

150. *Id.* at 709 (Powell, J., concurring).

151. Justice Douglas' dissenting opinion listed the "three minimal tests," which stated that the government must clearly show that

> "there is probable cause to believe that the reporter possesses information which is specifically relevant to a specific probable violation of law[,] . . . that the information it seeks cannot be obtained by alternative means, which is to say, from sources other than the reporter[,] . . . [and that] a compelling and overriding interest in the information [exists]."

408 U.S. at 713 n.1 (Douglas J., dissenting) (quoting brief for N.Y. Times as *amicus curiae* 29); *Id.* at 743 (Stewart, J., dissenting). *See* LaRouche v. National Broadcasting Co., 780 F.2d 1134 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); United States v. Burke, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); McGraw-Hill v. Arizona, 680 F.2d 5 (2d Cir. 1982); Riley v. Chester, 612 F.2d 708 (3d Cir. 1979); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); *In re* Consumers Union, 4 Media L. Rep. (BNA) 2119 (S.D.N.Y. 1978); Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973); People v. Bova, 118 Misc. 2d 14, 460 N.Y.S.2d 230 (N.Y. Sup. Ct. 1983); State v. Rinaldo, 102 Wash. 2d 749, 689 P.2d 392 (1984); Clampitt v. Thurston County, 98 Wash. 2d 638, 658 P.2d 641 (1983); Senear v. Daily J.-Am., 97 Wash. 2d 148, 641 P.2d 1180 (1982); *see also* Columbia Broadcasting Sys., Inc. v. Superior Court, 85 Cal. App. 3d 241, 149 Cal. Rptr. 421 (1978). *But see* United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988); Storer Communications, Inc. v. Giovan, 810 F.2d 580 (6th Cir. 1987); United States v. Criden, 633 F.2d 346 (3d Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982); Anderson v. Nixon, 444 F. Supp. 1195 (D.D.C. 1978); Kansas v. Sandstrom, 224 Kan. 573, 581 P.2d 812 (1978), *cert. denied*, 440 U.S. 929 (1979); Maine v. Hohler, 15 Media L. Rep. (BNA) 1611 (Me. Sup. Jud. Ct. 1988).

ruling on the power of judges to hold journalists in contempt for violating unconstitutional orders, it declined to do so.[152]

The first amendment often clashes with the contempt power of judges. On the one hand, judges must be able to enforce their decisions and vindicate the authority of courts by punishing those who disobey judicial orders.[153] Yet serious constitutional questions arise when the contempt power is used to punish journalists who disobey orders later held invalid.[154]

The Fifth Circuit Court of Appeals held in *United States v. Dickinson* that if a journalist disobeys a judicial order, the contempt citation that punished such disobedience will stand even if the order is later held unconstitutional.[155] The court believed that such a position was necessary to ensure the legitimacy of courts. The First Circuit later came to the opposite conclusion in *In re Providence,* holding that an unconstitutional order cannot support a contempt citation.[156]

The Supreme Court agreed to hear *Providence* to settle the issues raised by *Dickinson, Providence,* and related cases. After hearing oral argument, but before issuing an opinion, the Court unexpectedly dismissed the writ of certiorari on procedural grounds.[157] As a result, the First Circuit's opinion in *Providence* stands and continues to be in direct conflict with the Fifth Circuit's decision in *Dickinson.* It may be many years before the Supreme Court again has the opportunity to settle the issue of whether journalists who disobey unconstitutional orders are allowed to challenge them collaterally when appealing contempt convictions.

152. United States v. Providence J. Co., 484 U.S. 814 (1987).

153. *See generally* Labunski, *The Collateral Bar Rule and the First Amendment: The Constitutionality of Enforcing Unconstitutional Orders,* 37 AM. U.L. REV. 323 (1988).

154. *See* Walker v. Birmingham, 388 U.S. 307 (1967); *In re* Providence J. Co., 820 F.2d 1342 (1st Cir. 1986) (reversing district court's contempt order), *modified on reh'g en banc,* 820 F.2d 1354 (1st Cir. 1987), *cert. dismissed sub nom.* United States v. Providence J. Co., 485 U.S. 693 (1988); United States v. Dickinson, 465 F.2d 496 (1st Cir. 1972). Journalists argue that the news event, often a criminal trial, will remain newsworthy for only a limited period of time, and they cannot wait for an invalid order to be overturned on appeal. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). Courts would argue, however, that no litigant knows in advance what orders will be declared unconstitutional, and that everyone must obey a judicial order until modified or overturned. *Walker,* 388 U.S. at 317; *Dickinson,* 465 F.2d at 509.

155. *Dickinson,* 465 F.2d at 509.

156. *In re* Providence J. Co., 820 F.2d 1342 (1st Cir. 1986) (reversing district court's contempt order), *modified on reh'g en banc,* 820 F.2d 1354 (1st Cir. 1987), *cert. dismissed sub. nom.* United States v. Providence J. Co., 485 U.S. 693 (1988).

157. United States v. Providence J. Co., 485 U.S. 693 (1988). The Court held that the special counsel appointed by the federal district court in *Providence* had failed to properly obtain the attorney general's signature on the consent form granting the attorney the right to appeal in the name of the United States.

Under the principle of contiguous decision-making the Court could have issued an opinion in the case despite procedural flaws in the appeals process. Instead, the Court chose to allow the jurisdictional variance and confusion to continue.[158]

As discussed earlier, the Supreme Court has failed in a series of important libel cases to clearly state which party has the burden of proof in libel cases involving private person plaintiffs.[159] In the years since *Gertz,* the Court has had numerous opportunities to clarify whether a plaintiff must prove that the allegedly libelous statement was false, or the news organization had to prove it was true. Instead, the Supreme Court apparently assumed that lower courts would be able to read *Gertz* and its progeny with a sophisticated eye that discerned what the Court had indirectly stated in *Gertz.*

Gertz displaced the libel laws of all fifty states by requiring plaintiffs, whether public officials, public figures, or private persons, to demonstrate at least a minimal level of fault on the part of the publisher before collecting damages.[160] But the Court stopped there. It left lower courts and commentators to determine the next step in the analysis: Because all plaintiffs must prove fault, and a truthful statement can never constitute fault, all plaintiffs, including private persons, have the burden of proof, namely that the statements made about them were false.[161]

158. Washington state, for example, rejected the "collateral bar" rule (prohibiting a journalist from "collaterally" challenging the validity of the original order while appealing the contempt conviction) in State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 483 P.2d 608 (1971), *cert. denied,* 404 U.S. 939 (1971), but allowed a contempt conviction to stand even while concluding that the original order was invalid in Mead School Dist. v. Mead Educ. Ass'n (*Mead I*), 85 Wash. 2d 140, 530 P.2d 302 (1975), and Mead School Dist. v. Mead Educ. Ass'n (*Mead II*), 85 Wash. 2d 278, 534 P.2d 561 (1975). *See also* State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984). The rulings have been somewhat contradictory in other states. *Compare* Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P.2d 594 (1966) *with* State v. Chavez, 123 Ariz. 538, 601 P.2d 301 (1979). Jurisdictions rejecting the "collateral bar" rules include the First Circuit Court of Appeals, in *In re* Providence J. Co., 820 F.2d 1342 (1st Cir. 1986), *modified on reh'g en banc,* 820 F.2d 1354 (1st Cir. 1987), *cert. dismissed sub nom.* United States v. Providence J. Co., 485 U.S. 693 (1988); California, in *In re* Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968); Illinois, in Cooper v. Rockford Newspapers, Inc., 50 Ill. App. 3d 250, 365 N.E.2d 746 (1977); Massachusetts, in Fitchburg v. 707 Main Corp., 369 Mass. 748, 343 N.E.2d 149 (1976). Alabama upheld the collateral bar rule in *Ex Parte* Purvis, 382 So. 2d 512 (Ala. 1980).

159. This issue is considered important because it has long been assumed that if news organizations had to prove, under penalty of libel judgment, the accuracy of every statement they make, it would cause substantial self-censorship where both false and truthful statements would be deterred. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1973); New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

160. 418 U.S. at 347.

161. *See* Labunski, *supra* note 15, at 91-99; *see also* Prager, *Public Figures and the Public Interest,* 30 STAN. L. REV. 175-76 (1977).

At least one state supreme court was unable to make that logical connection. In *Hepps v. Philadelphia Newspapers, Inc.*,[162] the Pennsylvania Supreme Court held that *Gertz* had not undone the long-held practice in the commonwealth of requiring the defendant to prove the truthfulness of the statements. The court held that one's reputation is presumed to be good until proven otherwise by the publisher of the allegedly libelous statement.

In *Philadelphia Newspaper, Inc. v. Hepps*,[163] decided twelve years after *Gertz*, the Supreme Court corrected the Pennsylvania Supreme Court's misunderstanding and clarified the rule that private persons involved in matters of public interest have the burden of proof.

In the intervening twelve years between *Gertz* and *Hepps*, the Court apparently did not find the right occasion to clearly state who had the burden of proof. Contiguous decision-making would certainly have allowed the Court to do so not only in *Gertz*, but in several of its progeny.[164]

6) Contiguous decision-making will not set off a "chain reaction" which endlessly requires the Court to make a ruling on each contiguous issue.

Three years after the Supreme Court created the "public official" category of libel plaintiffs in *New York Times Co. v. Sullivan*,[165] it created the additional designation of "public figure."[166] The Court held that individuals involved in matters of public interest must meet the same standard of liability, namely actual malice, as public officials. Justice Harlan

162. 506 Pa. 304, 485 A.2d 374 (1984), *rev'd*, 475 U.S. 767 (1986).

163. 475 U.S. 767 (1986).

164. In Time, Inc. v. Firestone, 424 U.S. 448 (1976), which has several false-light privacy elements, the Court could have stated that Mrs. Firestone, as a private person, did or did not bear the burden of proof. Hutchinson v. Proxmire, 443 U.S. 111 (1979), and Wolston v. Readers' Digest Ass'n, 443 U.S. 157 (1979), both having private persons plaintiffs involved in matters of public interest, provided the Court with an opportunity to state on which party the burden of proof should fall. Herbert v. Lando, 441 U.S. 153 (1979), may have provided still another occasion for stating which party had the burden of proof. The case went to the Supreme Court on the issue of whether a journalist must divulge his thought processes and his communications with colleagues during the preparation of a television news report. *Herbert* involved procedural questions related to the discovery process and certainly provided, under a contiguous decision-making scheme, the opportunity to discuss a related procedural question, namely which party has the burden of proof. *Herbert* did, however, involve a public figure plaintiff, not a private person.

165. 376 U.S. 254 (1964). The status of the libel plaintiff is crucial because public officials and public figures must prove actual malice, while private persons in almost every state must prove only negligence. *See* Labunski, *supra* note 15, at 99-100.

166. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

specifically stated that the court had no occasion to determine the breadth of the new public figure category.[167]

Under contiguous decision-making, the Court did enough by creating the public figure category, a decision that was clearly "contiguous" to the public official designation in *New York Times.* It need not have taken the additional step of listing those who would be considered public figures. Although Court discussion of that issue would have had some value, it would not have been meaningful until the Court created the "private person" category in *Gertz* seven years later.[168]

7) Contiguous decision-making should be employed in cases that appear to have "landmark" status to protect that case's authority.

Court decisions that settle a conflict in a particular set of circumstances often generate litigation to determine what is lawful in a slightly different set of circumstances. Issues are continually raised for reconsideration in subsequent cases. The additional cases lead to the perception that nothing is finally settled; that there is no certainty or finality in the judicial process.

Contiguous decision-making could be utilized to enhance the precedential value of what already appears to be an important case. Statements beyond the holding required by the facts, if made carefully, will indicate that an appellate court wants to use the current case as a vehicle for dealing with an array of related matters. Covering those additional, or contiguous, issues in a single case will preserve its "landmark" status and may limit lower court variance and a corresponding diminution of the authority of the landmark case.

V
Conclusion

Whatever the potential for abuse of contiguous decision-making, it cannot be any worse than allowing compelling first amendment issues to remain unsettled for long periods of time. The result of such delay is

167. *Id.* at 155 (Harlan, J., writing for the Court).

168. The Court established and refined "public official" and "public figure" designations in Saint Amant v. Thompson, 390 U.S. 727 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); and private persons in Wolston v. Readers' Digest Ass'n, 443 U.S. 652 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1979); Rosenbloom v. Metromedia, 403 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The Court specifically defined "private persons" and "public figures" in Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974), and Time, Inc. v. Firestone, 424 U.S. 448, 453-54 (1979).

substantial variance in vital first amendment rights from jurisdiction to jurisdiction.

Granting courts limited authority to extend the holding of a case beyond the facts, and giving that extension precedential value, is not as controversial as it initially may appear. The first amendment itself became applicable to the states through the due process clause of the fourteenth amendment in an offhand, extraneous statement unnecessary to deciding the case.[169] The "preferred position" theory that has governed thinking about the first amendment for nearly half a century began in a footnote of a case having nothing to do with freedom of expression.[170]

Contiguous decision-making will give the courts some needed flexibility in a limited number of first amendment cases. Although there may be some enhancement of courts' overall authority, contiguous decision-making does not pose a threat to either the other branches of government or the rights protected by the Constitution. On the contrary, contiguous decision-making potentially offers courts the opportunity to provide additional first amendment protection to those whose rights would be abridged by laws or administrative action that interferes with free expression. Moreover, in an era of national news organizations, contiguous decision-making may provide the Supreme Court the opportunity to "nationalize" important aspects of first amendment law, thus preventing states clearly hostile to first amendment interests from inhibiting the exercise of freedom of speech and press within their borders.

Such additional authority would not create an "imperial" judiciary more powerful than the one that exists today. If judiciously applied, contiguous decision-making would allow courts to use carefully selected cases as a vehicle to answer first amendment questions that would otherwise linger for years, or indefinitely. Far from posing a danger to the first amendment, contiguous decision-making may well enhance its vitality.

169. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

170. For discussion of "preferred position" theory, see *supra* note 16.